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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 92-70
)	
SABLE COMMUNITY)	File No. BPED-851003MB
BROADCASTING CORPORATION)	
)	
GADSDEN STATE)	File No. BPED-860307MK
COMMUNITY COLLEGE)	
)	
TRINITY CHRISTIAN)	File No. BPED-860512MB
ACADEMY)	
)	
For Construction Permits)	
for New and Modified)	
Noncommercial FM Facilities)	
on Channel 217)	

To: Administrative Law Judge Arthur I. Steinberg

OPPOSITION TO MOTION FOR ACCEPTANCE
NUNC PRO TUNC OF LATE-FILED NOTICE OF APPEARANCE

Trinity Christian Academy ("Trinity"), by its counsel and pursuant to Section 1.294 of the Commission's rules, hereby opposes the "Motion for Acceptance Nunc Pro Tunc of Late-Filed Notice of Appearance" ("Motion") filed June 4, 1992 by Sable Community Broadcasting Corporation ("Sable").¹ In opposition, the following is stated:

Despite the directive in the Hearing Designation Order, DA 92-412 (released April 15, 1992) ("HDO") and Section 1.221(c) of the Commission's rules, requiring notices of appearance to be filed by May 6, 1992, Sable did not file its Notice of Appearance ("Notice") until May 19, 1992, two weeks late. It neither served

¹ Sable filed an erratum to that motion on June 5, 1992.

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its Notice on the other parties nor offered any explanation for its late filing. The Presiding Judge properly dismissed Sable's late-filed Notice by Order, 92M-614 (May 28, 1992). On May 29, 1992, Trinity filed a motion to dismiss Sable's application for its failure to timely file its notice of appearance.

Through its Motion filed June 4, nearly a full month after the filing deadline, Sable seeks to have its Notice accepted "nunc pro tunc." From a procedural standpoint, Sable's motion is subject to dismissal as an unauthorized petition for reconsideration of the Presiding Judge's May 28 Order. See 47 CFR §1.106(a)(1) ("Petitions for reconsideration of . . . interlocutory orders will not be entertained.") If considered on the merits, Sable's Motion must be denied for failing to demonstrate good cause for waiver of the filing requirements of Section 1.221 and the directives of the HDO.

The Commission has warned applicants that an untimely filing will be considered only if the tardiness is caused by a "calamity of a widespread nature that even the best of planning could not have avoided." See Public Notice, 58 RR 2d 1706 (1985). Sable cannot point to any such unusual and compelling circumstances. In fact, it does not identify the reason the Notice was filed so late.² Sable does note that until early June 1992, it was acting "effectively" pro se. Specifically, it claims that even though Sable principal Marcus Reid, an attorney, did sign its

² For example, Sable does not reveal whether it miscalculated the deadline or simply ignored it.

Notice, Mr. Reid does not practice in the area of communications law. But that fact is insufficient to excuse Sable's tardiness.

First, even if Sable were considered to have prosecuted its application without the assistance of counsel, it did so at its own risk. As the Commission has often times cautioned, where an applicant elects to act without counsel, it has the burden of becoming acquainted with, and conforming to, the Commission's rules and procedures. See CSJ Investments, Inc., 5 FCC Rcd 7653, 7654, 68 RR 2d 897, 899 (1990) (citations omitted). Thus, the Commission "will neither excuse nor tolerate the disruption of its processes because an applicant, which undertakes to act as its own counsel, is unfamiliar with the Commission's rules and procedures." Id. Sable's decision to attempt to prosecute its application without the benefit of communications counsel does not warrant acceptance of its late-filed Notice.

Furthermore, Sable is not the "unsophisticated" applicant it now tries to paint itself. One of its principals, Mr. Reid, is an attorney. That attorney executed its Notice. Thus, Sable did have the benefit of legal counsel. While Mr. Reid does not practice communications law, the HDO was clear in its directive:

IT, IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

HDO, ¶23. It did not take any particular legal expertise, or even knowledge of the Commission's rules, to calculate the date by which the HDO required the written appearance to be filed.

Sable cites John Spencer Robinson, 5 FCC Rcd 5542, 68 RR 2d 397 (Rev. Bd. 1990), for the proposition that the Commission will take into account such equitable considerations as the sincerity of the excuse for lateness, the sophistication of the applicant, and whether the applicant was engaged in gamesmanship. But that case does not support Sable's cause. In Robinson, individual applicant John Robinson had until May 29, 1990 to file his notice of appearance and hearing fee. The HDO was issued at the time the Commission's hearing fee was being increased. Based upon advice from an FCC official that if his notice of appearance and fee were postmarked by May 18, 1990, he could pay the lower fee, Robinson mailed his filing on that date. He also sent service copies to the other applicants on May 18. However, Robinson apparently was not told that the fee also had to be received at the Commission by May 21, 1990. Thus, on May 25, 1990, the Commission sent Robinson a letter stating that his notice and fee had been received too late to meet the old fee schedule and that he would have to re-file under the new rules with a check for a larger amount. Robinson did not receive the Commission's letter until two days after the May 29 notice of appearance filing deadline. Soon thereafter, he re-filed his notice of appearance with a new check for the increased fee.

5.

Describing it as a "close call," the Review Board accepted Robinson's late-filed notice of appearance and hearing fee. It concluded that such a result was called for "given the particular circumstances of this proceeding," including the facts that new fees had been established one day before release of the HDO, Robinson had sent his notice of appearance two weeks before the filing deadline, and he had subsequently attempted to comply with the new fee schedule. The Board found that "Robinson essentially committed himself to participate in this proceeding several weeks before the relevant deadline" Id. at 5544, 68 RR 2d at 399.

The facts here are not at all similar. First, whereas Robinson filed his notice of appearance two weeks prior to the filing deadline, Sable filed its notice of appearance more than two weeks after that deadline. Further, unlike Robinson, Sable did not serve copies of its Notice on the other parties. Moreover, while Robinson relied on apparently erroneous advice from an FCC official, and was faced with changing rules, Sable had only to read the clear language of the HDO, which (apparently) it timely received, in order to determine what was required to be filed and when.

Sable argues that its "slow reaction" to the HDO is "understandable because its application has been pending since 1985." Apparently Sable advocates tying an applicant's obligation to comply with Commission regulatory requirements to how quickly the Commission's staff processes its application. Such a

suggestion not only is unsupported by caselaw, it defies logic. Indeed, the fact the applications have been pending for so long merely emphasizes the importance of adhering to procedural deadlines so as to initiate service to the public in the most expeditious manner possible.

Sable emphasizes that this is a proceeding for a noncommercial station, noting the Commission does not apply the "hard look" processing standard and uses a more lenient financial qualifications standard than for commercial stations. Thus, it urges a relaxed standard for requiring noncommercial applicants to adhere to filing deadlines. However, the Commission has never said that its procedural rules are not equally applicable to commercial and noncommercial applicants. Regardless of the type of station sought, the Commission has the responsibility to provide new service to the public in the most efficient, expeditious manner possible, and that effective and expeditious dispatch of the FCC's business is, in itself, an integral part of the public interest. See CSJ Investments, supra, 5 FCC Rcd at 7654, 68 RR 2d at 899. Moreover, "the process of selecting which of otherwise qualified applicants should be granted must remain fair and effective, but undue delay in that process disserves the public by delaying the institution of new service and exacting an economic toll on both the Government and the applicants. To the extent that we can eliminate unnecessary delays in that process, we will be serving the potential listening and viewing public, the American taxpayer, and the applicants." Proposals to Reform the Commission's

Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 164 (1990), aff'd, 6 FCC Rcd 3403 (1991). Failure to abide by the Commission's rules, including filing deadlines (Sable also has not filed the environmental assessment due May 15, 1992)³, eviscerates those rules and promotes gamesmanship, at great expense to the public interest.

Moreover, allowing Sable to ignore filing deadlines would prejudice the other applicants, who have abided by them, as well as disserve the public. The HDO designated four applications for hearing. One, Shorter College, requested dismissal of its application on May 27, 1992. Sable, of course, failed to timely file its notice of appearance, making its application ripe for dismissal. Thus, there are remaining two viable applicants, Trinity and Gadsden State Community College ("Gadsden"). On May 21, 1991, Gadsden petitioned to amend its application to substitute Channel 218 for the presently-proposed Channel 217 and to make other technical modifications which would remove the mutual exclusivity between Trinity and Gadsden. Gadsden's amendment was supported by the Mass Media Bureau in comments filed June 2, 1992. Acceptance of Gadsden's amendment would eliminate the need for a comparative hearing, leading to grant of both Trinity's application

³ As Trinity notes in its motion to dismiss filed May 29, 1992, Sable's failure to respond to (a) the Commission's November 26, 1991 letter requiring all applicants to file an environmental statement or (b) the directive of the HDO requiring that statement be filed by May 15, 1992, establishes a separate basis for dismissal of its application. Sable maintains in its Motion that it intends to submit that information with a "good cause" showing for late acceptance.

for Oxford, Alabama, and Gadsden's application for Gadsden, Alabama. This would result in prompt initiation of new services for both of those communities. If Sable were allowed to prosecute its application despite its refusal to follow the Commission's rules, the Oxford listening public would be left waiting for many more years, while a dangerous precedent would be set condoning dilatory tactics.

Applicants have a high burden to justify an exception to procedural deadlines. See CSJ Investments, supra, 5 FCC Rcd at 7654, 68 RR 2d at 899. Sable, with no legitimate excuse for refusing to meet Commission filing deadlines, has failed to meet that burden. The Presiding Judge already has dismissed Sable's notice of appearance, thus dismissal of its application is now a ministerial act. See e.g. Section 1.221(c) of the rules, warning that where an applicant fails to file a timely notice of appearance "the application will be dismissed with prejudice for failure to prosecute." (Emphasis added.)⁴ Thus, Sable's Motion should be denied and its application dismissed.

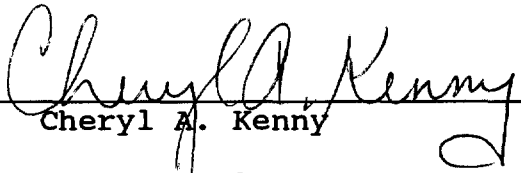
⁴ Thus, Sable's complaint that Gadsden and Trinity should not have engaged in a settlement/discovery meeting without it is meritless.

9.

WHEREFORE, In light of the foregoing, the Motion for Acceptance Nunc Pro Tunc of Late-Filed Notice of Appearance filed June 4, 1992 by Sable Community Broadcasting Corporation must be DENIED.

Respectfully submitted,
TRINITY CHRISTIAN ACADEMY

By 
Harry C. Martin

By 
Cheryl A. Kenny
Its Counsel

Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

June 10, 1992

CERTIFICATE OF SERVICE

I, Pamela R. Payne, hereby certify that on this 10th day of June, 1992, copies of the foregoing **MOTION FOR ACCEPTANCE NUNC PRO TUNC OF LATE-FILED NOTICE OF APPEARANCE** were hand-delivered or mailed, first class, postage prepaid, to the following:

Administrative Law Judge Arthur I. Steinberg *
Federal Communications Commission
2000 L Street, N.W., Room 228
Washington, D.C. 20554

Paulette Laden, Esquire *
Hearing Branch, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

Gerald Stephens-Kittner, Esquire
Arter & Hadden
1801 K Street, N.W.
Suite 400
Washington, D.C. 20006
Counsel for Sable Community Broadcasting Corporation

M. Scott Johnson, Esquire
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 East Tower
Washington, D.C. 20005
Counsel for Gadsden State Community College


Pamela R. Payne

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